



APR 7 1973

IN THE

MICHAEL ROBAK, JR., CLERK

Supreme Court of the United States

OCTOBER TERM, 1972

No. A-534

**HELEN STEIN GAUDET, Administratrix of
THE ESTATE OF AWTREY C. GAUDET, SR.,
Plaintiff-Appellant,**

versus

**SEA-LAND SERVICES, INC.,
Defendant-Appellee.**

**RESPONSE OF PLAINTIFF-APPELLANT IN OPPOSI-
TION TO GRANT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

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TO THE HONORABLE CHIEF JUSTICE AND AS-
SOCIATE JUSTICES OF THE SUPREME COURT OF
THE UNITED STATES:

Helen Stein Gaudet, Administratrix (respondent here
and plaintiff-appellant below), in compliance with the
orders of the Court makes the following response to the
petition for certiorari in the above cause:

OPINIONS BELOW

The minute entry of the District Court in dismissing plaintiff's petition is correctly quoted in Appendix A of the petition for certiorari and the opinion of the Fifth Circuit is correctly produced in Appendix B, reported in 463 F.2d 1331.

JURISDICTION

The jurisdiction of this Court is conceded under Title 28 Section 1254(1) United States Code.

QUESTIONS PRESENTED

Respondent concedes arguendo the correctness of the questions presented in (1) through (5) of the petition for certiorari but avers that the sixth "Question" assumes falsely that *"the award to decedent included pecuniary loss and anticipated all losses resulting from the accident"* since the award to decedent before his death quite obviously could not include damages from his death.

STATEMENT OF THE CASE

The facts are correctly stated in the opinion of the Fifth Circuit.

ARGUMENT

I

In Paragraph I of "Reasons for Granting the Writ of Certiorari," (p. 7 of application) petitioner asserts that the 5th Circuit has created a conflict between the General Maritime Law on one hand and the Jones and Death on the High Seas Act on the other.

Respondent submits that the 5th Circuit did not try to expand the scope of *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), nor does the opinion attempt to spell out which items of damages are compensable. That was left for another interpretation of *Moragne*. Therefore, if any conflict exists, as asserted here, it was not created in this case. The conflict would be between *Moragne* and the *Jones and High Seas Act*, not *Gaudet* and those statutes.

II

In Paragraph II of "Reasons for Granting the Writ of Certiorari" petitioner (p. 8 of application) asserts that a conflict has been created between the Fifth and Third Circuits because the instant decision is in conflict with *Roberts v. Union Carbide Corp.*, 415 F.2d 474 (3rd Cir. 1969).

Respondent submits that *Roberts* is an opinion solely concerned with the interpretation of a New Jersey statute. In that opinion, the Third Circuit relied on two New Jersey cases cited. See 415 F.2d 474 at 475.

The instant case is an interpretation (of *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970) and could hardly create a conflict with an interpretation of a New Jersey "survival" statute.

III

In Paragraphs III and IV of "Reasons for Granting the Writ of Certiorari," petitioner merely disagrees with the rationale of the decision of the Circuit Court. Respondent submits that this does not constitute grounds for granting of writs to this Court.

The death claim in the instant case is born in the admiralty law, *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 90 S.Ct. 1772 (1970). *Moragne* recognizes the right of those closest to the decedent to recover for "their total loss of one on whom they depended."

Petitioner is correct in stating that the majority view precludes the recovery by a beneficiary after the recovery by a decedent during his lifetime. However, the "majority" view is based on interpretations of so-called "survival" statutes and not true "death" statutes. A short, but accurate, exposition of the distinction is found in *Wilson v. Massengill*, 124 F.2d 666, cert. den. 62 S.Ct. 1274 (1942), in which the Sixth Circuit distinguishes the Tennessee "survival" statute from the South Carolina "death" statute, holding that the latter was not "res judicata" after decision in the former.

Returning to the *Moragne* decision, it is clear that this Court recognized only the right conferred in the South Carolina statute. Throughout the opinion the Court refers to "their total loss of one on whom they de-

pended." 90 S.Ct. 1772 at 1778. Specifically, the Court discussed the common law rule that a personal cause of action "did not survive the death of its possessor." The Court continued "However, it is now universally recognized that because this principle pertains only to the victim's own personal claims, such as for pain and suffering, it has no bearing on the question whether a dependent should be permitted to recover for the injury he suffers from the victim's death." 90 S.Ct. 1772 at 1780.

We believe that the well-reasoned decision of the Fifth Circuit discusses these problems at length and we rely on that decision as part of this response.

Wherefore respondent prays that the application for certiorari be denied.

Respectfully submitted,

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CERTIFICATE

I, George M. Leppert, hereby certify that I am a member in good standing of the Bar of the Supreme Court of the United States, that all of the foregoing facts are true and correct and that a copy of the foregoing response has been served upon opposing counsel, correctly addressed and postage prepaid on the ____ day of April, 1973.

